STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v	No. 251017 Oakland Circuit Court
CHRISTOPHER WALTER HOWARD, Defendant-Appellant.	LC No. 2003-189534-FC

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(a). He was sentenced to life imprisonment without parole. Defendant appeals as of right, and we affirm.

Defendant first argues that the prosecution presented insufficient evidence of premeditation and deliberation to support his first-degree murder conviction. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of first-degree murder are: (1) that the defendant killed the victim and (2) that the killing was "willful, deliberate, and premeditated." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). In the present case, defendant challenges the sufficiency of the evidence only in connection with the second of these elements.

With regard to the sufficiency of the evidence, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Intent and premeditation may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

Specifically in regard to the element of premeditation and deliberation, "[p]remeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Further:

> Premeditation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." [*Id*.]

In the present case, the prosecution presented extensive evidence that defendant acted with premeditation and deliberation in killing the victim. It is true that defendant presented evidence to the contrary. However, as set forth above, this Court must consider the evidence in the light most favorable to the prosecution. *Johnson*, *supra* at 723. Moreover, all conflicts in the evidence must be resolved in favor of the prosecution. *Fletcher*, *supra* at 562. Under these circumstances we find that the prosecution presented sufficient evidence for a rational trier of fact to find that the element of premeditation and deliberation was proven beyond a reasonable doubt.

Defendant next argues that the trial court abused its discretion when it permitted a police officer to state his lay opinion regarding footprints found outside the victim's home. Again we disagree. The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Moreover, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

MRE 701, which governs the admissibility of lay opinions, provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

On this question, this Court has stated that "[a]ny witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin* (*After Remand*), 216 Mich App 452, 459; 549 NW2d 878 (1996).

In the present case, the officer in question testified that he had compared photographs of footwear impressions found outside the victim's home with one of the shoes taken from defendant's hotel room. He then testified that, based on this comparison, he believed that the footwear impression left in the snow and defendant's shoe were identical or nearly identical in both size and pattern. The officer's testimony, thus, was based on his physical observations and

the opinions he formed as a result of those observations. In other words, his testimony was rationally based on his perceptions. Moreover, this testimony also was helpful to the determination of a fact in issue. This testimony made it more likely than it would have been without the evidence that defendant broke into the victim's home on the night in question, and thus was helpful in the determination of whether defendant's actions on that night were premeditated and deliberate. Accordingly, the trial court did not abuse its discretion when it permitted the prosecution to introduce this evidence.

Defendant next argues that the trial court erred in permitting a witness to testify as to statements made to her by the victim expressing the victim's fear of defendant. Defendant asserts that this evidence constituted inadmissible hearsay, and that the admission of this evidence also violated defendant's rights under the Confrontation Clause. We disagree.

We first note that, although defendant preserved his evidentiary challenge for appellate review, he did not preserve his Confrontation Clause challenge for our review. Defendant asserts that by preserving his evidentiary challenge, he also thereby preserved his constitutional challenge. This assertion, however, is incorrect. This Court has held that preservation of an evidentiary claim does not preserve a Confrontation Clause claim. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

As set forth *supra*, the decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Starr*, *supra* at 494. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Snider*, *supra* at 419, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Hine*, *supra* at 250. Moreover, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Smith*, *supra* at 680.

Because defendant failed to preserve his Confrontation Clause challenge for appellate review, appellate review is under the test set forth in *Carines*, *supra*, which requires that there must be (1) an error; (2) the error must be plain, i.e. clear or obvious; and (3) the error must affect substantial rights, i.e. there must be a showing of prejudice or that the error was outcome determinative. Moreover, reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763.

MRE 801 defines hearsay as being "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 802 provides that "hearsay is not admissible except as provided by [the Michigan Rules of Evidence]." MRE 803(3) provides an exception to this general bar against hearsay for statements made regarding a declarant's then existing mental, emotional, or physical condition. This rule states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [MRE 803(3).]

Our Supreme Court has made clear that evidence that "demonstrates an individual's state of mind will not be precluded by the hearsay rule," and that statements of murder victims as to plans or feelings are admissible where relevant to material issues, including motive. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995).

In the present case, the challenged evidence establishes the victim's state of mind as to discord between defendant and the victim shortly before the victim was killed. Therefore, the victim's statement regarding her fear of defendant was admissible as circumstantial evidence of motive and premeditation. Moreover, because this statement was highly probative of the familial discord existing at the time the statement was made, the statement's probative value outweighed any prejudice to defendant. Thus, MRE 403, which provides that evidence, although relevant, may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, also did not bar the admissibility of this testimony. Accordingly, the trial court did not abuse its discretion when it admitted this testimony.

We note that defendant has also asserted that this testimony was inadmissible because he did not place the victim's state of mind at issue. However, this Court has explicitly held that a victim's state of mind need not be at issue in order for evidence to be admissible under MRE 803(3). *Coy*, *supra* at 15-16. Accordingly, this argument is without merit.

With regard to defendant's Confrontation Clause argument, the United States Supreme Court, in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), held that out-of-court statements that are testimonial are barred under the Confrontation Clause unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant, regardless of whether the statements are deemed reliable by the trial court. With regard to what constitutes a testimonial statement, the *Crawford* Court stated that: "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 124 S Ct 1374. In the present case, the victim's statements regarding her fear of defendant clearly are not akin to these examples. Accordingly, the victim's statements were not testimonial in nature, let alone plainly so. As a result, the trial court did not commit plain error when it permitted the witness to testify as to the victim's statements regarding her fear of defendant because the admission of this testimony did not violate defendant's Confrontation Clause rights.

Defendant's final argument on appeal is that the prosecutor engaged in misconduct when she made certain statements in her closing and rebuttal arguments because those statements constituted an improper appeal to the jury to sympathize with the victim and to convict defendant of first-degree murder on that basis and that trial counsel denied defendant the effective assistance of counsel when it failed to object to these improper statements. Once again, we disagree. Because defendant failed to preserve his prosecutorial misconduct argument, appellate review is under the test set forth in *Carines*, *supra*, which requires that there must be (1) an error;

(2) the error must be plain, i.e., clear or obvious; and (3) the error must affect substantial rights, i.e. there must be a showing of prejudice or that the error was outcome determinative. Moreover, reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763.

In connection with defendant's ineffective assistance of counsel argument, the defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id*. at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland*, *supra* at 687-688, *Pickens*, *supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, a prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Further, prosecutors are generally accorded great latitude regarding their arguments and conduct. *Bahoda*, *supra* at 282. However, although a prosecutor may argue that a witness should be believed, he may not appeal to the jury to sympathize with the victim. *Watson*, *supra* at 591. Moreover, a prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *Bahoda*, *supra* at 282.

In the present case, defendant argues that the challenged statements were improper because they constituted an improper appeal to the jury to sympathize with the victim. However, looking at the statements in context, we believe that the prosecutor's statements were not improper. While the prosecutor repeatedly spoke of justice for the victim, she did so each time in the context of arguing the facts in evidence. Each statement of this type was immediately preceded by or followed by a discussion of the elements of first-degree murder and the evidence presented in the case. The essence of the prosecutor's closing and rebuttal arguments was that, based on the evidence presented, specifically evidence indicating that defendant premeditated

and deliberated killing the victim, the only proper result was to find the defendant guilty of first-degree murder. Such an argument did not constitute an improper appeal to the jurors' sympathy for the victim. Rather, it merely constituted a proper argument of the evidence and the reasonable inferences arising from that evidence.

Additionally, we find that the prosecutor's remarks regarding the victim herself did not constitute an improper appeal to the jurors' sympathy. Again, these statements represented no more than a compilation of the evidence presented regarding the victim and an argument of this evidence and the reasonable inferences arising from this evidence. Accordingly, the prosecutor did not commit plain error when she made the challenged statements.

With regard to defendant's ineffective assistance argument, as set forth above the prosecutor's remarks were not improper. This being the case, trial counsel could not have been ineffective in failing to object to the prosecutor's statements. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell